No. 15416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

600 Federal Building,
Los Angeles 12, California,

Attorneys for Appellee.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Jurisdiction 1

Statutes involved 2

Statement of the case 3

Summary of argument 4

Argument 5

There was no abuse of discretion in the denial of voluntary departure; the record is clear that appellant illegally re-entered the United States four days after a previous grant of voluntary departure 5

TABLE OF AUTHORITIES CITED

Statutes	Page
Code of Federal Regulations, Title 8, Sec. 242.61(f)(2)(ii)	3
Declaratory Judgment Act (28 U. S. C., Sec. 2201)	1
Immigration and Nationality Act, Sec. 241(a)(2)	2
Immigration and Nationality Act, Sec. 244	2
Immigration and Naturalization Service Under the Administrative Procedures Act (5 U. S. C., Sec. 1009)	1
United States Code, Title 8, Sec. 1251(a)(2)	2
United States Code, Title 8, Sec. 1254(e)	2
United States Code, Title 28, Sec. 1291	1
United States Code, Title 28, Sec. 1294(1)	1

No. 15416

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

VICTOR MANUEL GIL,

Appellant,

vs.

ALBERT DEL GUERCIO, as District Director of the Immigration and Naturalization Service at Los Angeles, California,

Appellee.

On Appeal From the United States District Court for the Southern District of California, Central Division.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction of the action for declaratory judgment to review a final administrative deportation order of the Immigration and Naturalization Service under the Administrative Procedures Act, 5 U. S. C. 1009, and the Declaratory Judgment Act, 28 U. S. C. 2201.

This Court has jurisdiction of this appeal from the Findings, Conclusions and Judgment of the District Court [T. R. 14] in favor of defendant and against the plaintiff, holding that said deportation order is valid, under the provisions of 28 U. S. C. 1291 and 1294(1), said order being a final decision of the District Court.

Statutes Involved.

Section 241(a)(2) of the Immigration and Nationality Act [8 U. S. C. 1251(a)(2)] reads as follows:

"§*1251. Deportable aliens—General classes*

"(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

"* * *

"(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States."

Section 244 of the Immigration and Nationality Act [8 U. S. C. 1254(e)] relates to voluntary departure and provides as follows:

"(e) *Voluntary departure*

"The Attorney General may, in his discretion, permit any alien under deportation proceedings, other than an alien within the provisions of paragraphs (4)-(7), (11), (12), (14)-(17), or (18) of section 1251(a) of this title (and also any alien within the purview of such paragraphs if he is also within the provisions of paragraph (4) or (5) of subsection (a) of this section), to depart voluntarily from the United States at his own expense in lieu of deportation if such alien shall establish to the satisfaction of the Attorney General that he is, and has been, a person of good moral character for at least five years immediately preceding his application for voluntary departure under this subsection. June 27, 1952, c. 477, Title H, ch. 5, §244, 66 Stat. 214."

The provisions of Section 242.61(f)(2)(ii) of Title 8 of the Code of Federal Regulations provides as follows:

> "(f) *Appeals.* * * *
>
> "(2) No appeal shall lie from an order of a special inquiry officer denying an application for voluntary departure or preexamination as a matter of discretion, where: * * *
>
> "(ii) The alien has been in the United States for a period less than five years at the time of the service of the warrant of arrest in deportation proceedings."

Statement of the Case.

This is an appeal from a decision of the District Court, affirming a final order of deportation by the Immigration and Naturalization Service, of appellant, admittedly an alien, after a judicial review of the administrative file which was offered in evidence as appellee's Exhibit A, which exhibit is transmitted to this Court in its original form and is not contained in the printed record on appeal.

Appellant, admittedly an alien, was on November 21, 1953, granted voluntary departure to Mexico and about four days thereafter, or on about November 25, 1953, he reentered the United States without inspection. [Ex. A, pp. 2, 3.] A warrant of arrest was issued and a special inquiry hearing was held on February 24, 1955, and the decision of the special inquiry officer that the appellant was deportable was affirmed by the Board of Immigration Appeals when it dismissed the appeal from the special inquiry officer's order on February 23, 1956.

As stated in Appellant's Opening Brief (App. Br. 7) the last three lines of Finding of Fact III of the

District Court [T. R. 16] that "No appeal was ever taken from said order of deportation and said order of deportation became final" is erroneous and was included in said Findings by the appellee by mistake.

The fact as above set forth is that an appeal was taken and dismissed by the Board of Immigration Appeals. In any event, the mistaken Finding is immaterial because there is no dispute that the order of deportation which was reviewed by the District Court was a final administrative order of deportation.

In his decision [Ex. A] the special inquiry officer in the exercise of his discretion denied appellant's application for voluntary departure. An analysis of both Points I and II of appellant's brief indicates that the arguments therein contained all relate to that denial of voluntary departure.

Since the grant or denial of voluntary departure is a matter of discretion, the only question which could be raised before the District Court or on this appeal is whether or not there was an abuse of discretion in such denial. This is the question which we treat in our argument.

There is no question with regard to the deportability of appellant, it being admitted in the hearings [Ex. A] and stipulated in the pre-trial order [T. R. 13] that the appellant is a native and citizen of Mexico and that he last entered the United States about November 25, 1953, without inspection.

Summary of Argument.

I.

There was no abuse of discretion in the denial of voluntary departure; the record is clear that appellant illegally re-entered the United States four days after a previous grant of voluntary departure.

ARGUMENT.

There Was No Abuse of Discretion in the Denial of Voluntary Departure; the Record Is Clear That Appellant Illegally Re-entered the United States Four Days After a Previous Grant of Voluntary Departure.

Appellant's arguments under both Points I and II and under his Statement of the Case all seem to relate to the question of denial of voluntary departure by the special inquiry officer. Pursuant to the regulations, *supra,* there was no appeal to the Board of Immigration Appeals on this question. This being a matter of discretionary action, the only question in the District Court and here is whether or not there was an abuse of discretion in the denial of voluntary departure.

Appellant's argument seems to be that there is nothing in the record to sustain the reason given by the special inquiry officer for the denial of voluntary departure, namely, that the appellant had previously been granted voluntary departure and illegally entered the United States four days later. The record clearly supports the reason and statement of the special inquiry officer whose decision, in that portion discussing the application for voluntary departure, reads in part as follows [Ex. A in evidence, page 2 of the Decision of the Special Inquiry Officer]:

> "An alien who once was granted voluntary departure privilege and who again is found here illegally does not merit a second chance for such privilege in the absence of strong extenuating circumstances. . . . There are no extenuating circumstances in this case, particularly as the respondent had every opportunity, after having been granted a previous

voluntary departure, to apply for an immigrant visa and lawfully enter the United States if he wished to do so. And further, the respondent has shown no reason why he could not have accepted the privilege of voluntary departure offered him at the time of his apprehension. Voluntary departure privilege is solely a matter of discretion and no alien can claim that privilege as a matter of right. Considering all the factors in this case, it is found that the respondent has resided in the United States for less than five years, that he has previously been granted the voluntary departure privilege in lieu of deportation, that there are no strong extenuating circumstances as to why he should be granted the voluntary departure privilege another time and, on the basis of the entire record, his application in the present proceedings for voluntary departure in lieu of deportation will be denied as a matter of administrative discretion."

At the hearing on February 24, 1955, at pages 2 and 3, are contained the following questions and answers given by the appellant, who admits his prior voluntary departure and subsequent illegal reentry:

"Q. When did you last enter the United States? A. On 1953 or 1954 in November.

Q. Well, have you been here more than a year. A. More.

Q. It must have been November 1953, is that right? A. Yes, I believe so.

Q. About what date of the month did you enter? A. Around the middle of the month.

* * * * * * * *

Q. When did you first enter the United States? A. It was in October 1953, I don't remember the first part of the month it was.

Q. How did you accomplish that entry? A. I came in near San Ysidro, also.

Q. How many times have you entered the United States? A. Only two.

* * * * * * * *

Q. Well what caused your departure after your first entry? A. I was apprehended by the detective here on Broadway in San Diego.

Q. Were you picked up by the Immigration and sent out? A. I was brought to the Immigration by the detective.

Q. And what did the Immigration do with you? A. I was sent to Mexico.

Q. How long were you detained? A. I was taken to San Pedro for one or two days.

Q. Were you deported from the U. S. or were you granted voluntary departure privilege? A. Voluntary departure.

Q. On what date were you granted that voluntary departure privilege? A. It was on the 21st of November, 1953."

Appellant next argues that voluntary departure was denied for reasons not indicated on the record, and that at one point in the proceedings it was indicated that appellant would be granted voluntary departure and this was later withdrawn.

While it is not conceded that appellant's contentions with regard to matters outside the record are true, nevertheless such arguments are not persuasive because it is clearly

not an abuse of discretion to deny voluntary departure to an alien who has once abused that privilege by illegally re-entering after such a grant. Based on that reason alone the denial would be proper.

The judgment of the District Court should be affirmed.

Respectfully submitted,

LAUGHLIN E. WATERS,
United States Attorney,

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief of Civil Division,

ARLINE MARTIN,
Assistant U. S. Attorney,

Attorneys for Appellees.